No. 86-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALPHONSE DELLA-DONNA,

Petitioner,

—against—

GORE NEWSPAPERS COMPANY and HAMILTON C. FORMAN,

Defendants,

GORE NEWSPAPERS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH CIRCUIT

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Questions Presented For Review

1. Whether the decision of the Florida District Court of Appeal—by finding plaintiff to be a public figure even though plaintiff simply participated in private-party litigation over a gift from a private trust to a private institution, the public did not debate this gift and the defamations concerned alleged fiduciary breaches wholly unrelated to the gift or the private institution—subverts the constitutional balance struck by *New York Times* v. *Sullivan* by expanding the scope of the public figure doctrine and thus ignoring *Sullivan's* First Amendment focus on protecting uninhibited and robust public debate on public issues?

2. Whether the decision of the Florida District Court of Appeal, which afforded full *Sullivan* protection to defendant's publications, upsets the constitutional balance by eliminating the requirement of public debate on a public issue where the judicial resolution of the issue might have an impact on the public?

3. Whether the decision of the Florida District Court of Appeal misapplies the public figure analysis of this Court by converting into a public figure every plaintiff who participates as a party or attorney in a litigation that receives any substantial media coverage?

4. Whether the decision of the Florida District Court of Appeal undermines the balance struck by this Court, which protects the reputations of private persons under the common law, subject only to limited First Amendment restrictions, by not affording the same protection when the private affairs of a person found to be a "vortex" public figure are at issue?

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To the Justices of the Supreme Court of the United States:

Petitioner, Alphonse Della-Donna ("Della-Donna"), respectfully prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of Florida, Fourth District affirming the Circuit Court of the 17th Judicial Circuit, in and for Broward County, Florida, dismissing petitioner's complaint against Gore Newspapers Company ("Gore Newspapers") on the grounds that Della-Donna was a "vortex" public figure who failed to present sufficient evidence of actual malice to defeat a motion for summary judgment under the principles of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

Opinions Below

The order of the Supreme Court of Florida, declining in its discretion to accept jurisdiction, is reported at 494 So.2d 1150 (Fla. 1986) and is reproduced in Appendix C (17a-18a). The opinion of the Florida District Court of Appeal is reported at 489 So.2d 72 (Fla. 4th DCA 1986) and is reproduced in Appendix A (1a-12a). The opinion and order of the Circuit Court granting respondent's motion for summary judgment is unreported and is reproduced in Appendix B (13a-16a).

Jurisdiction

The order of the Supreme Court of Florida was rendered on September 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Constitutional Provisions Involved

1. First Amendment, United States Constitution:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

2. Fourteenth Amendment, Section 1, United States Constitution:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

Statement Of The Case

Alphonse Della-Donna, an attorney, brought this libel action against the Gore Newspapers Company ("Gore News-

papers") for six articles and a letter to the editor published in the *Fort Lauderdale News* and against Hamilton C. Forman for a radio broadcast. Della-Donna brought the action in the Circuit Court for Broward County, Florida ("trial court"), where Gore Newspapers[1] moved for summary judgment on several grounds after depositions had been taken, the pleadings formed and the case set for trial. The trial court granted the motion (App. B at 15a-16a). On appeal, Florida's District Court of Appeal for the Fourth District ("appellate court") affirmed, finding that Della-Donna was a "vortex" public figure in a matter of public controversy and that no genuine issue of fact existed as to evidence of actual malice (App. A at 11a-12a).

The Petitioner

Della-Donna is an attorney who practices law in Fort Lauderdale, Florida. In early 1971, he prepared a complex estate plan for Leo Goodwin, Sr., a Fort Lauderdale resident who had founded the Government Employees Insurance Company ("GEICO") (*see* App. B at 14a). The plan created, among other things, a charitable remainder trust ("Unitrust") and a private charitable organization, the Leo Goodwin Foundation of Fort Lauderdale, Inc. ("Goodwin Foundation").

Mr. Goodwin died on May 28, 1971. Della-Donna's law firm has acted since then as the attorneys for the Goodwin estate, the Unitrust and the Goodwin Foundation; Della-Donna has also served as one of three trustees for the Foundation ("Foundation Trustees").

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[1] Forman was not involved in either the summary judgment motion filed by Gore Newspapers or in the appeal.

The Foundation Trustees' Designation Of Donees And The Ensuing Litigation With Nova

In 1976, the Foundation Trustees fulfilled Mr. Goodwin's intent that his fortune be used to benefit local institutions by designating Nova University ("Nova"), a private university in Broward County, as one of three contingent donees of the Unitrust (App. A at 11a). Two years later, Della-Donna learned that Nova was not a locally controlled institution; rather, Nova had been controlled since 1970 by the New York Institute of Technology ("New York Institute"), which in turn was dominated by the Schure family of New York City. Della-Donna and the other Foundation Trustees contemplated rescinding the substantial gift to Nova unless local control could be assured or the designated funds be administered by a local public foundation.

Della-Donna communicated the Trustees' intention to Nova and engaged in a series of private discussions and meetings with the administration and certain board members to avert rescission. A resolution of this problem reached on March 27, 1978 evaporated when the Nova administration reneged on its commitment to return control of the Nova board to local residents. On April 19, 1978, Della-Donna wrote a letter to Nova's president and the members of its board of trustees detailing the negotiations which had been conducted, asserting that Nova had concealed its foreign control and reiterating that the Foundation Trustees were likely to rescind the gift designation unless Nova honored its resolution of March 27, 1978. Della-Donna marked the letter "Confidential" and treated it as such, sending it only to individuals with the authority to determine Nova's conduct.

On April 25, 1978, Nova sued the Unitrust Trustees, including Della-Donna, to obtain the premature disburse-

ment of the funds designated to Nova. Nova issued a press release concerning its lawsuit.

On May 4, 1978, Della-Donna filed an action on behalf of the Goodwin estate and the Foundation Trustees for a declaratory judgment seeking ratification of the Foundation Trustees' rescission of the gift designation to Nova on the basis of Nova's fraudulent concealment of its control by the New York Institute and the New York City-based Schure family.

During the period from April 25 until May 6, 1978 when the first defamatory article was published, Della-Donna issued no press releases and held no press conferences. Indeed, Della-Donna did not initiate any contact with the press. Della-Donna did, however, respond to questions from the press during this period and he did permit a Gore reporter to pick up a copy of a single document prepared by Della-Donna for the Nova Trustees, dated March 27, 1978, which was neither labeled a "press release" nor ever "disseminated" to the press.

Once the first defamation appeared on May 6, 1978, Della-Donna essentially stopped answering questions from the press; he referred all inquiries to his attorney.

The Defamations

The first report about the litigation appeared in the *Fort Landerdale News,* which is published by defendant Gore Newspapers,[2] in response to Nova's first press release (App. A at 3a). A few articles published prior to May 7, 1978 contained statements from Della-Donna which he had provided in response to questions from the local newspaper (App. B at 14a).

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[2] Gore Newspapers also publishes the city's only other newspaper, the *Fort Lauderdale Sun-Sentinel.*

On May 6, 1978, Gore Newspapers published its first defamation against Della-Donna, criticizing the "Goodwin Trust Lawyer" for his "billings in excess of $900,000." Della-Donna's actual legal fees from the trust from 1971 to 1978 were less than $45,000.

On June 3, 1978, Della-Donna was charged with diverting $9 million from the Unitrust to the Goodwin estate and with receiving legal fees in the "unconscionable" amount of $950,000. The $9 million was properly paid to the Goodwin estate from the Unitrust in quarterly installments ending in 1976. These quarterly payments totaling $9 million were mandated by a specific court order. The legal fee, paid by the estate to Della-Donna in 1972, represented 4.5 years of past and future work and was specifically approved by court order.

The July 5, 1978 article reiterated that Della-Donna had billings to the Goodwin estate of "almost $1 million."

Gore Newspapers charged Della-Donna in its February 13, 1979 article with "bilking" the Goodwin estate of $1.3 million—a 1975 court-approved, court-ordered distribution made to Mr. Goodwin's son, the principal beneficiary of the Goodwin estate.[3]

These charges addressed actions taken by Della-Donna in the years from 1971 through 1976 as an attorney for the Goodwin estate and for the Unitrust. They do not address Della-Donna's conduct in 1978 concerning rescission of the Foundation Trustees' designation of Nova or the composition of Nova's board.

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[3] In addition, plaintiff complained about two other articles and a letter to the editor.

The "Public" Debate

The only editorial, published by Gore Newspapers before the defamations against Della-Donna began, concerns itself solely with the issue of local control over Nova. The sole letter to the editor was written by a close friend of the Nova president, whose husband also had ties to Nova.

The rest of the public was apathetic. Nova's president actually complained that the public had not rallied to Nova's cause against Della-Donna and the other Foundation Trustees.

Decisions Below

On September 7, 1983, the trial court granted summary judgment to Gore Newspapers on the grounds that Della-Donna was a limited public figure who had "voluntarily injected himself into the vortex of the public controversy concerning the gift to Nova" (App. B at 15a), and that "there is absolutely no showing of actual malice that would give rise to a cause of action on behalf of a limited public figure" (App. B at 16a).

The trial court found the existence of a controversy over the rescission of the designation of Nova as a donee of the $14.5 million gift in light of the concealed foreign control of Nova's board. The court however ignored the nature of the charged defamations themselves and never even hinted at a possible relationship between the controversy and the defamations.

The trial court offered certain "salient facts." Two of these facts evidence the private nature of the controversy over rescission and control of Nova: the statement by one member of Nova's board to other members occurring at a private meeting of Nova's board weeks before the first

press coverage of the litigations and Nova's April 25, 1978 lawsuit requesting disbursement of the funds (App. B at 14a). The only cited fact even superficially capable of evidencing any "public" debate over rescission and control does not involve the public; the editorial in the *Fort Lauderdale News* on the issue of control was published by defendant Gore Newspapers.

Other "salient facts" concern Della-Donna's purported plunge into the controversy: in a letter marked "Confidential" and sent only to Nova's president and its board, Della-Donna wrote Nova's president on April 19, 1978 charging that Nova had fraudulently misrepresented the fact of local control and threatening to rescind the gift to Nova (App. B at 14a). This letter received no press coverage either when written or later. The court also cited articles in which Della-Donna's positions were reported and his statements were quoted, and Della-Donna purportedly making two documents available to Gore Newspapers (*id.*). Della-Donna did not initiate any contact with the press. He never made any press statements or circulated any materials to the media; he simply answered questions and he essentially stopped doing even that with the appearance of the first defamation on May 6, 1978. Finally, the trial court pointed to Della-Donna's filing an action against Nova for a declaratory judgment ratifying the Foundation Trustees' rescission of the designation of Nova.

On April 23, 1986, the appellate court affirmed, finding that Della-Donna had "initiated a series of purposeful, considered actions, igniting a public controversy in which he continued to play a prominent role" (App. A at 11a). The manner in which the court reaches this conclusion illustrates the need to define the concrete requirements for a public figure finding: the court makes this finding by simply saying it is so. This approach infects the appellate court's

analysis in three critical areas: (1) the existence and scope of the "public controversy"; (2) the nature and extent of Della-Donna's participation in the controversy; and (3) the nexus between the defamations and the public controversy.

The Existence And Scope Of The Public Controversy

After passing reference to *Firestone*, *Hutchinson* and *Wolston* and their warnings not to equate newsworthy private disputes or matters of general interest with public controversies under *Gertz*,[4] the appellate court candidly admitted that "although it is clear that the community had an interest in the outcome of the dispute, it is difficult to identify the public controversy with precision" (App. A at 9a). The court implicitly acknowledged that only "[c]ertain aspects of the disagreement between the Nova trustees and Della-Donna such as local control and fiscal soundness . . . [have an] impact on the public" (App. A at 10a) and wondered whether "public opinion [could] sway the outcome" by "persuading a private donor to make a gift to a private university" [5] (App. A at 9a).

The appellate court simply sidestepped these problems by pronouncing that the dispute between Nova and Della-Donna over the rescission of the gift designation "obviously impact[s] on the public" and thus meets the criterion that " 'persons beyond the immediate participants in the dispute . . . feel the impact of its resolution' " (App. A at

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[4] *Time, Inc.* v. *Firestone*, 424 U.S. 448, 453-454 (1976); *Hutchinson* v. *Proxmire*, 443 U.S. 111, 135 (1979); *Wolston* v. *Readers Digest Ass'n*, 443 U.S. 157, 166 n.8 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974).

[5] As this Court has expressly informed us, public opinion should have no effect upon the merits of a private legal dispute between private parties nor upon the outcome of the litigation. *Firestone*, 424 U.S. at 454 n.3.

10a), citing *Waldbaum* v. *Fairchild Publications Inc.*, 627 F.2d 1287, 1297 (D.C.Cir.), *cert. denied*, 449 U.S. 898 (1980).[6] The court also found that the "public in some measure was expressing its opinion" (App. A at 10a) even though the "letters to the editor" consisted of one letter, written by a friend of Nova's president whose husband also had ties to Nova and even though the "editorials" amounted to one editorial published by defendant Gore Newspapers.[7] The real public, as Nova's president bitterly complained, was apathetic. Public controversy was thus defined to include a dispute limited to a private civil litigation where the public itself was not participating in the dispute nor seeking to influence the resolution of the private dispute.

Della-Donna's Participation In The Controversy

The appellate court first required Della-Donna to "'play[] a sufficiently central role in that controversy . . .'" (App. A at 10a), citing *Dameron* v. *Washington Magazine, Inc.*, 779 F.2d 736, 741 (D.C.Cir. 1985), *cert. denied*, 106 S.Ct. 2247 (1986). Della-Donna met the criterion when serving as a "trustee and the lawyer of the Trust, [and having] a duty to discharge his obligations as he saw them in order to effectuate his client's wishes . . , he partici-

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[6] Finding a public controversy on this basis in the context of a civil litigation converts all private civil lawsuits involving private parties into public controversies where their outcomes may conceivably affect the public in some way. *Contra: Denny* v. *Mertz*, 106 Wis.2d 636, 318 N.W.2d 141, *cert. denied*, 459 U.S. 883 (1982) (lawsuit to win control of large public corporation is not a public controversy even though its outcome necessarily affects the 11,500 shareholders, 10,000-11,000 employees and thousands of suppliers, customers and people living where the corporation's plants were).

[7] A defendant cannot immunize itself from libel liability by creating a "public controversy" with its own editorials. *Hutchinson*, 443 U.S. at 135.

pated in the designation of Nova as a beneficiary [and . . .] he negotiated and litigated with Nova when [the Foundation Trustees] determined that the designation was an error and not in accordance with the wishes of [Della-Donna's] deceased client and the settlor of the trust" (App. A at 11a). The court concludes that Della-Donna is not an involuntary public figure because of these purposeful, considered actions.[8]

The Nexus

While noting that the alleged defamation must be germane to the plaintiff's involvement in the controversy (App. A at 10a), the court eliminated this factor as a necessary element to finding Della-Donna a public figure in regard to the charged defamation.[9]

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[8] The court also found that Della-Donna had a continuing, prominent role in the controversy he ignited notwithstanding the fact that the last purposeful Della-Donna action cited by the court (App. A at 3a) took place on May 4, 1978 when he filed the declaratory judgment action—two days before the first defamation and eight months before the last.

[9] It is not surprising that the court failed to analyze this issue. Allegations that Della-Donna had taken unconscionable fees or diverted funds from the trust are simply not germane to the "public controversy" occurring over rescission of the gift designation of Nova because of the concealment of foreign control of the university.

REASONS FOR GRANTING THE WRIT

The Balance Struck In *New York Times* v. *Sullivan*, *Gertz* v. *Robert Welch* And Their Progeny Is Being Skewed By Widespread And Irreconcilable Differences Over The Scope And Application Of The "Vortex" Public Figure Doctrine, Requiring Action By This Court At This Time.

It is time for the Supreme Court "to nail the jellyfish to the wall." [10] Unless the Supreme Court "fleshe[s] out the skeletal description of public figures and private persons enunciated in *Gertz*," [11] the balance struck between the First Amendment and the protection of human dignity will continue to be skewed by decisions like *Della-Donna*.

Della-Donna affords this Court an opportunity to establish rules governing the public figure doctrine in the three areas where lower court decisions have made the doctrine as difficult to pin down as the proverbial jellyfish: the meaning of public controversy, the nature and extent of plaintiff's purposeful activity and the required relationship between the public controversy and the claimed defamation. At stake is the very constitutional underpinning of the *Sullivan* doctrine. The scope of the "vortex" public figure doctrine must be reshaped to fit the First Amendment and its focus on the protection of uninhibited and robust public debate on public issues. *Sullivan*, 376 U.S. at 270; *Dun & Bradstreet, Inc.*v. *Greenmoss Builders, Inc.*,

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[10] Lower courts have found that "defining a public figure is much like trying to nail a jellyfish to the wall." *Rosanova* v. *Playboy Enterprises, Inc.*, 411 F.Supp. 440, 443 (S.D.Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978).

[11] *Waldbaum*, 627 F.2d at 1292; *see also Harris* v. *Tomczak*, 94 F.R.D. 687, 697 (E.D.Cal. 1982).

105 S.Ct. 2939, 2944-2947 (1985) (plurality). Otherwise, as in *Della-Donna*, an unfocused and over-expanded public figure analysis will strip individuals of their reputations without recourse even though there is no public debate on public issues. In addition, the *Sullivan* protections provided by this Court can effectively deter self-censorship only if they are set forth in precise and predictable rules of analysis.

A. This Court Must Secure The Balance Struck In *Sullivan*, *Gertz* And Their Progeny By Requiring The State And Lower Federal Courts To Shape The "Vortex" Public Figure Doctrine To Fit The First Amendment.

The First Amendment gives public and binding expression to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open." *Sullivan*, 376 U.S. at 270; *see Philadelphia Newspapers, Inc.* v. *Hepps*, 106 S.Ct. 1558, 1561 (1986). This Court has put this commitment into practice by preventing plaintiffs who have thrust themselves into the vortex of a particular public controversy from vindicating their honor and their reputations unless they can prove actual malice under *Sullivan*—i.e., that they were the victims of calculated or reckless lies. *Sullivan*, 376 U.S. at 279-280; *Gertz*, 418 U.S. at 345-346.

Requiring public plaintiffs to prove actual malice administers an "extremely powerful antidote" to the poison of media self-censorship, but the price exacted from libel victims is correspondingly high. *Gertz*, 418 U.S. at 342. In practice, "vortex" public figures virtually never can collect compensation for the damage done to their reputations, nor vindicate their honor by demonstrating that the defamation was false. A public price is also paid; we sacrifice a competing tenet of our constitutional system: " 'our basic concept of the essential dignity and worth of

every human being—a concept at the root of any decent system of ordered liberty.'" *Gertz*, 418 U.S. at 341, quoting *Rosenblatt* v. *Baer*, 383 U.S. 75, 92 (1966) (J. Stewart, concurring). This Court has thus shaped the "vortex" public figure doctrine to fit the First Amendment values requiring protection. The Court has applied the doctrine only to defamations published in pre-existing[12] public controversies[13] about the public conduct[14] of individuals who have plunged into the vortex of the controversy and who have engaged public attention for the purpose of influencing its outcome.[15] But in the seven and one-half years since this Court last addressed the doctrine in *Wolston*, confusion has reigned in the state and lower federal courts about the proper scope of the doctrine. That confusion subverts the very values the doctrine was designed to serve.[16]

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[12] "Those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson*, 443 U.S. at 135.

[13] Not all newsworthy events qualify. Mary Alice Firestone's much-publicized divorce "is not the sort of 'public controversy' referred to in *Gertz* even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." *Firestone*, 424 U.S. at 454. Even issues of genuine and legitimate public concern do not come within the orbit of a public controversy where there is no public debate. General public concern over public expenditures is not a public controversy under *Gertz*. *Hutchinson*, 443 U.S. at 135; *see Wolston*, 443 U.S. at 166 n.8 (doubting the existence of a public controversy about the desirability of permitting Soviet espionage in the United States when "all responsible United States citizens understandably were and are opposed to it").

[14] *See Sullivan*, 356 U.S. at 279-280, preventing recovery by a public official "for a defamatory falsehood *relating to his official conduct*" unless he can prove it was made with knowledge of or reckless disregard for its falsehood (emphasis added).

[15] *Gertz*, 418 U.S. at 351.

[16] Permitting the press to print with impunity defamations concerning the private affairs of public persons does not contribute

(footnote continued on following page)

B. Rules Governing "Vortex" Public Figures Should Be Both Precise And Predictable.

In shaping the "vortex" public figure doctrine to fit the First Amendment, the courts must do so with precision and predictability. The press cannot avoid unnecessary self-censorship if they cannot accurately predict (1) whether they will be sued; (2) whether they will win; and (3) how much the litigation will cost. L. Tribe, *American Constitutional Law* §12-13 642 (1978) ("Tribe") (although the decision to publish involves a complex calculus, these are the salient factors). Deciding who is a "vortex" public figure, and thus who must prove actual malice and bear the other burdens triggered by actual malice,[17] significantly affects two out of three[18] factors. It is obviously much more difficult for public figures to win. *Gertz*, 418 U.S. at 342-343, 346; Eaton, *The American Law of Defamation Through Gertz* v. *Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va.L.Rev. 1349, 1375 (1975); Tribe, §12-13 at 638-640; *see* Libel Defense Resource Center Bulletin No. 17 at 27-28 (Spring, 1986) (even before

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(footnote continued from previous page)

to self-government. *See Gertz*, 418 U.S. at 353. And giving full First Amendment protection to private disputes of only general interest to the public undermines our commitment to the concept of human integrity without measurably enhancing public debate on public issues. *See Greenmoss Builders, Inc.*, 105 S.Ct. at 2943.

[17] A "vortex" public figure's complaint will be dismissed on summary judgment unless he or she can provide clear and convincing evidence of actual malice. *Anderson* v. *Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2513 (1986). In addition, the determination that there was clear and convincing evidence that a defendant published the defamation with knowledge of or reckless disregard for its falsity is subject to *de novo* review on appeal. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984).

[18] If plaintiffs consult experienced libel lawyers before filing suit, even the likelihood of the press being subjected to a suit will be affected.

Liberty Lobby, libel defendants were obtaining summary judgment three out of every four times). Public figure litigation costs less because summary judgment is more available. Tribe, §12-13 at 642; *see* Anderson, *Libel and Press Self-Censorship,* 53 Tex.L.Rev. 422, 437-438 (1975).

Precision in defining "vortex" public figures protects another value implicitly recognized by *Gertz;* "[d]emocracies should avoid deterring citizen involvement in public affairs." *Waldbaum,* 627 F.2d at 1293 n.11, citing *Gertz,* 418 U.S. at 352. Fear of being stripped of their reputations without recourse may deter some individuals from engaging in public activities or speaking out on public issues. Clear and precise rules for determining who is a "vortex" public figure will allow them "to calculate correctly, and not overestimate or underestimate, the effect that undertaking some activity will have on the legal recourse available to [them]. . . ." *Waldbaum,* 627 F.2d at 1293.

C. There Are Widespread And Irreconcilable Differences In The State And Lower Federal Courts Over The Proper Scope And Application Of The "Vortex" Public Figure Doctrine.

The state and lower federal courts have had ample opportunity to apply the "broad rules of general application" set forth in *Gertz,* 418 U.S. at 343-344. There are now widespread and irreconcilable differences in how these courts define public controversy; how they determine when an individual has plunged into the vortex of the controversy to engage the public's attention and influence its outcome; and how they assess the nexus between the defamation and the controversy. The necessary result of this confusion is that neither public speech nor the precious

reputations of private figures are given the protection intended by *Sullivan* and *Gertz*.

1. *Public Controversy.*

While this Court has explained that public controversies involve something more than mere issues of general public concern, *Hutchinson*, 443 U.S. at 135, the basic attributes of "public controversy" remain a matter of vast confusion. Some courts read "controversy" to mean what it says,[19] requiring "a real dispute." *Waldbaum*, 627 F.2d at 1296; *see Gannett Co., Inc.* v. *Re*, 496 A.2d 553, 558 (Del. 1985). But the Third Circuit disagrees, rejecting "the notion that merely because most people would agree that drug trafficking is undesirable, there is no 'controversy' regarding the matter." *Marcone* v. *Penthouse International Magazine for Men*, 754 F.2d 1072, 1083 n.8 (3d Cir. 1985). In direct and irreconcilable conflict is *Rancho La Costa, Inc.* v. *Superior Court (Penthouse Int'l, Ltd.)*, 106 Cal.App.3d 646, 658-659, 165 Cal.Rptr. 347, 354-355 (1980), *appeal dismissed*, 450 U.S. 902 (1981), where there was no public controversy over the "desirability" of "organized crime" because "[a]ll conscientious and responsible people are opposed to it."

When a dispute constitutes a controversy is also in conflict. There was no public controversy involving a minister accused of luring Naval recruits into homosexual encounters under the guise of religious counseling even though, only months before the article in question, complaints about plaintiff's sexual advances had caused him to be barred from supervising offenders in a county probation program. *Davis* v. *Keystone Printing Service, Inc.*, 111 Ill.App.3d 427, 438-439, 444 N.E.2d 253, 260 (1982).

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[19] "Controversy" is defined as "a discussion marked esp[ecially] by the expression of opposing views: dispute." *Webster's Ninth New Collegiate Dictionary*, 285 (9th ed. 1983).

In contrast, the fact that complaints had been made about the quality and price of plaintiff's product before the broadcast led the court to conclude that a public controversy did exist. *Steaks Unlimited, Inc.* v. *Deaner,* 623 F.2d 264, 273-274 (3d Cir. 1980).

Similarly, this Court's distinction between "controversies of interest to the public" and "public controversies," *Firestone,* 424 U.S. at 454, is itself a subject of disagreement. Some courts do not insist on public participation in the controversy, requiring only that its outcome have impact or ramifications beyond the immediate participants. *Waldbaum,* 627 F.2d at 1296. On the other hand, the Wisconsin Supreme Court found that a vigorous and successful campaign by dissident shareholders to change the management of a large Milwaukee corporation did not constitute a public controversy even though it had obvious ramifications beyond the immediate participants and generated widespread news coverage reflecting public interest. *Denny* v. *Mertz,* 106 Wis.2d at 649-650, 318 N.W.2d at 147-148. One year later a Michigan court found that the efforts of dissident Teamsters to amend a local's by-laws did constitute a public controversy because the internal union dispute was "of wide public concern." *Lins* v. *Evening News Ass'n,* 9 Media L.Rep. (BNA) 2380 (Mich. Ct.App. Oct. 10, 1983).[20] *Compare Arnold* v. *Taco Properties, Inc.,* 427 So.2d 216, 218 (Fla.1st DCA 1983) (school's dispute with licensing board constituted public controversy

[20] Perhaps the courts draw the distinction along union/management lines. *Compare Waldbaum,* 627 F.2d at 1299 ("Being an executive within a prominent and influential company does not by itself make one a public figure") *with Miller* v. *Transamerican Press, Inc.,* 621 F.2d 721, 724 (5th Cir. 1980), *cert. denied,* 450 U.S. 1041 (1981) ("[plaintiff], a high-ranking official of a union of tremendous importance to our economy, as relates to his official duties is a public figure").

because of "consumer interest aspect" affecting potential students and health care consumers) *with Eastern Milk Producers* v. *Milkweed,* 8 Media L.Rep. (BNA) 2100 (N.D.N.Y. July 16, 1982) (plaintiff's application for a federal loan to finance two cheese processing plants was not a public controversy under *Gertz* even though it was controversial and its resolution would necessarily affect both the working and the cheese-buying public).

2. *Plunging Into The Vortex Of Public Controversy.*

Although *Gertz, Firestone* and *Hutchinson* all addressed the public figure status of attorneys or parties in litigation, clarification is critically needed. Permitting courts to find that a party has thrust himself into the vortex of public controversy merely by bringing or defending a lawsuit may "deter[] either resort to the courts to settle disputes when one believes he has been wronged or active defense when he believes he has been accused of some civil or criminal misconduct unjustifiably." *Waldbaum,* 627 F.2d at 1296 n.23. *Compare Newell* v. *Field Enterprises, Inc.,* 91 Ill.App.3d 735, 754, 415 N.E.2d 434, 448 (1980) (no voluntary injection into public controversy where defamation published before the libel plaintiff had either received the summons or answered the complaint) *with Adams* v. *Maas,* 7 Media L.Rep. (BNA) 1188 (S.D. Tex. Feb. 23, 1981) (plaintiff "plunged" into controversy by voluntarily undertaking practices and activities which private parties brought civil action to stop). *Compare also Milkovich* v. *The News-Herald,* 15 Ohio St.3d 292, 297, 473 N.E.2d 1191, 1195 (1984) (nationally known high school wrestling coach who testified at hearing contesting the disqualification of his squad from the state tournament for fighting at a meet where he was coaching did not thereby thrust himself into the forefront of the controversy to in-

fluence its outcome) *with Friedgood* v. *Peters Publishing Co.*, 13 Media L.Rep. (BNA) 1479, 1480 (Fla.Cir.Ct. Sept. 24, 1986) (applying *Della-Donna* to reverse its earlier ruling denying summary judgment and find that plaintiff, whose testimony as a witness was crucial to convicting her father of the murder of her mother and who "involved" herself in the crime by hiding evidence, played a central role in the controversy).

Neither the merits of private legal disputes nor their resolution should be influenced by press conferences or other efforts to engage public attention. *Firestone,* 424 U.S. at 455 n.3. Thus, parties to litigation who respond to press inquiries or even invite the press to attend judicial hearings do not thereby become public figures unless they are using press coverage of the litigation "to influence the resolution" of other public controversies. *Levine* v. *CMP Publications,* 738 F.2d 660, 672 (5th Cir. 1984); *see Burgess* v. *Reformer Publishing Corp.*, 508 A.2d 1359, 1361-1363 (Vt. 1986) (public figure status turned on factual dispute over whether plaintiff approached the press and used the press to assert his denial of involvement in the embezzlement investigation or whether he merely responded to press inquiries).[21]

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[21] But one court's "response to inquiries" is another court's "manipulation of the press." *Compare Jensen* v. *Times Mirror Co.*, 634 F.Supp. 304, 311-312 (D.Conn. 1986) (the acquiesence by plaintiff, who was the roommate of accused Brinks robber, Kathy Boudin, in interviews conducted by plaintiff's newspaper colleagues is sufficient even though plaintiff contends she was pressured into talking) *with Schultz* v. *Reader's Digest Ass'n, Inc.*, 468 F.Supp. 551, 559 (E.D.Mich. 1979) (plaintiff, an ex-convict allegedly involved in the disappearance of labor leader Jimmy Hoffa, deemed to be a private figure even though he voluntarily responded to reporters' inquiries).

3. *Nexus Between The Defamation And The Public Controversy.*

Finally, at least some courts insist that the alleged defamation "must have been germane to the plaintiff's participation in the controversy." *Waldbaum,* 627 F.2d at 1298; *O'Donnell* v. *CBS, Inc.,* 782 F.2d 1414, 1417 (7th Cir. 1986). But there is confusion; the Sixth Circuit's decision that the manager of a theatre with financial troubles was not a limited public figure regarding allegations about his personal bankruptcy was vacated for a rehearing *en banc. Bichler* v. *Union Bank & Trust Co.,* 715 F.2d 1059 (6th Cir.), *vacated,* 718 F.2d 802 (1983).

Failure to require that the defamation directly relate to the public controversy can result in decisions like *Della-Donna.* There, full First Amendment protection was given to speech concerning purely private conduct—an attorney's purported breaches of fiduciary duty to an estate and a charitable trust[22]—wholly unrelated to the only possible public controversy over rescission of a gift designation to a private university because of the foreign control of the university's board (App. A at 2a, 10a; App. B at 13a-14a). The Supreme Court, however, has given full First Amendment protection only to public debate about public figures over issues of public concern. *Philadelphia Newspapers, Inc.* v. *Hepps,* 106 S.Ct. at 1563. The Supreme Court has not expressly decided what protection should be afforded to speech concerning "the private affairs of a 'public person.'" *Sisler* v. *Gannett Co., Inc.,* No. A-56/57, slip op. at 13 (N.J. Oct. 21, 1986); *see Hepps,* 106 S.Ct. at 1563. The *Sisler* court concluded that such speech

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[22] The evidence on the summary judgment motion showed that Della-Donna never committed any of these breaches—a fact never reported by Gore Newspapers.

should be accorded the relaxed constitutional protection afforded all speech on matters of private concern. *Id.*[23] The issue remains generally unresolved. This Court should in this case define the rules governing speech concerning the private affairs of a "vortex" public figure within the First Amendment focus of *Sullivan.*[24]

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[23] *See also Restatement (Second) of Torts* § 580A (1981) (actual malice standard protects communication "concerning a public official or public figure in regard to his conduct, fitness or role in that capacity").

[24] In addition, the nature of the private conduct of a "vortex" public person needs definitional guidelines by the Court. *Compare Lerman* v. *Flynt Distributing Co., Inc.*, 745 F.2d 123, 137-138 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 2114 (1985) and *Lerman* v. *Chuckleberry Publishing Co.*, 521 F.Supp. 228, 234 (S.D.N.Y. 1981) (photographs purportedly of plaintiff appearing nude in a movie are properly the subject of public controversy even though plaintiff had not injected her own personal conduct or nudity into her discussion of "equal nudes for all") *with Harris* v. *Tomczak*, 94 F.R.D. at 707-708 (plaintiff, who wrote the "self-help" book *I'm Okay—You're Okay* and who would be a "vortex" public figure in the field of psychotherapy, would not be a public figure for the purpose of defendant's charge that he had committed suicide).

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the District Court of Appeal of the State of Florida, Fourth Circuit.

Respectfully submitted,

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December 8, 1986

APPENDICES

APPENDIX A

Opinion of District Court

IN THE

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT JANUARY TERM 1986

Not Final Until Time Expires to File Rehearing

Petition and, if Filed, Disposed of

Case Nos. 83-2146 and 83-2437

ALPHONSE DELLA-DONNA,

Appellant,

v.

GORE NEWSPAPERS COMPANY, a Delaware corporation authorized to do business in the State of Florida, and HAMILTON C. FORMAN,

Appellees.

Opinion filed April 23, 1986

Consolidated appeals from the Circuit Court for Broward County; J. Cail Lee, *Judge.*

Frates Bienstock & Sheehe, Miami; Jonathen W. Lubell and Mary K. O'Melveny of Cohn, Glickstein, Lurie, Ostrin, Lubell & Lubell, New York; and Robert J. O'Toole, Fort Lauderdale, *for appellant.*

Ray Ferrero, Jr., and Ricki Tannen of Ferrero, Middlebrooks, & Strickland, Fort Lauderdale, *for appellee, Gore Newspapers.*

Appendix A—Opinion of District Court

BARKETT, ROSEMARY, *Associate Judge.*

This appeal emanates from a final summary judgment for the Gore Newspaper Company (Gore) in a libel action brought by Alphonse Della-Donna (Della-Donna).

Della-Donna claims that Gore libeled him in a series of articles which ran in the *Fort Lauderdale News* from May 6, 1978, to February 13, 1979. The articles concerned a dispute between Della-Donna and the Trustees of Nova University over the final disbursement of a 14.5 million dollar gift to Nova, a private university located in Broward County. The trial court determined that Della-Donna was a limited public figure and that no genuine issue of material fact existed to show evidence of actual malice. Accordingly, the court entered summary judgment for Gore. We affirm.

Della-Donna is a lawyer who in 1971 provided some complex estate planning for his client, Leo Goodwin, Sr., which included the establishment of a foundation and a charitable remainder trust (Unitrust). Mr. Goodwin, Sr., died on May 28, 1971, without naming any beneficiaries of the trust.

In 1976, the Goodwin Foundation Trustees, of which Della-Donna was one, exercised their power under the Unitrust and designated trust beneficiaries which included Nova University. Approximately two years later, in 1978, appellant and Nova University became embroiled in a dispute regarding the control of the university. Della-Donna advised the trustees of Nova University that Mr. Goodwin, Sr.'s desire was to help *locally* controlled institutions and that he had recently discovered that Nova's Board of Trustees was controlled by the New York Institute of

Technology which, in turn, was controlled by the Schure family in New York. Della-Donna advised Nova's Trustees that the Goodwin Foundation Trustees were inclined to rescind the gift unless Nova agreed to be operated under "some semblance of local control."

Several subsequent meetings between Della-Donna and representatives of the university occurred in an attempt to resolve the dispute. On April 19, 1978, Della-Donna sent a "confidential" letter to all Nova Trustees informing them of the ongoing negotiations and advising that if local control was not effectuated he would be forced to rescind the gift.

On April 25, 1978, Nova filed a petition in the circuit court to force distribution of the gift. Upon the filing of this lawsuit, Gore learned about the dispute and began reporting it. On May 4, 1978, Della-Donna filed a complaint for declaratory relief on behalf of the estate of Leo Goodwin, Sr., charging that Nova had fraudulently misrepresented a material fact concerning its management and control, and seeking to rescind the gift.

Between May 1976 and October 1978, Gore ran a total of 78 articles covering the announcement of the Goodwin gift and the ensuing controversy over rescission. Della-Donna alleges that he was libeled in seven of these. The first six essentially involve reporting the charges made by Nova in court documents that Della-Donna had improperly charged the estate over one million dollars in fees. The last alleged libel involved the printing of an unfavorable letter to the editor concerning the lawsuit and the position taken by Della-Donna therein.

Della-Donna raises two points on appeal: (1) that the lower court erred in finding him to be a "limited public

figure in a matter of public controversy"; and (2) that even if such a finding is correct, the lower court erred in finding that no genuine issues of material fact exist from which a reasonable jury could find actual malice.

In order to determine whether the "actual malice" standard of proof must be applied to Gore's conduct, the status of the plaintiff as a public official, "general" public figure, "limited" public figure, or private figure must be established. This necessitates a brief review of the law's evolution regarding the status of a plaintiff vis-a-vis the standard of proof.

Before 1964, the individual states were free to apply their own law, common or otherwise to the tort of libel. In Florida:

> defendants who did not establish either a privilege or truth as an affirmative defense were subject to strict liability. If a privilege applied to the defendant, the plaintiff could overcome the privilege by proving that the defendant acted with *express* malice. . . . [which] encompasses "ill will, hostility, evil intention to defame and injure." [Emphasis added; citations omitted.]

Miami Herald Publishing Company v. *Ane,* 458 So.2d 239, 240 (Fla. 1984).

In 1964, in the landmark case of *New York Times* v. *Sullivan,* 376 U.S. 254, 269, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964), the United States Supreme Court noted that libel "must be measured by standards that satisfy the first amendment." The Court held that the Constitution limits a state's power to award any damages for libel in actions brought by public officials against critics of their official

conduct unless he or she proves that the statement was made with "actual malice." *Id.* at 283, 84 S.Ct. at 727. In *New York Times,* the advertisement which was the subject matter of the libel claim involved "one of the major public issues of our time." *Id.* at 271, 84 S.Ct. at 721. According to the Court, the actual malice standard was mandated because "debate *on public issues* should be uninhibited, robust, and wide open. . . ." *Id.* at 270, 84 S.Ct. at 721 (emphasis added).

In *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), the same strict standard of proving actual malice was extended to "public figure" plaintiffs. As in *New York Times,* the Court in *Curtis* was deciding a case which involved a public concern:

> We note that the public interest in the circulation of the materials here involved, and the publisher's interest in circulating them, is not less than that involved in *New York Times.*

Id. at 154, 87 S.Ct. at 1991.

In the plurality opinion of *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29, 44, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), the Court indicated that the distinction between private and public figures was meaningless. As long as the defamatory statements involved "a matter of public or general interest," the *New York Times* standard would apply. *Id.* at 43-44, 91 S.Ct. at 1820. Three years later, however, in *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Court held that the protections of *New York Times* did not extend as far as *Rosenbloom* had suggested.

Gertz clearly involved expression on a matter of public or general interest and concern, but the court held that

the fact that expression concerned a public issue did not *by itself* entitle the libel defendant to the constitutional protections of *New York Times*. The *Gertz* court further refined the concept of "public figure" noting that there were two classes of public figures: "general public figures" who have fame or notoriety in a community and who are always for every purpose to be considered public figures and "limited public figures" who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" and who are public figures only with regard to certain issues. *See id.* at 345, 94 S.Ct. at 3009. Utilizing this analysis, the court determined that Gertz, who, as in this case, was a lawyer representing a client, was a *private* figure. The issue then became whether the *New York Times* standard of "actual malice" applied to a discussion of any issue of significant public interest when the person defamed therein was a private person. The court determined that in such a situation the standard of actual malice must be used to recover presumed or punitive damages, but that a lesser standard of fault as determined by each state could be used to recover actual damages if those damages could be proved. *Id.* at 348-50, 94 S.Ct. at 3011-12.

In Florida, our supreme court has adopted negligence as the applicable standard for recovery of actual damages in a case which involved a private figure and a public issue. *Miami Herald Publishing Co.* v. *Ane*, 458 So.2d 239 (Fla. 1984). Although language in *Ane* appears to interpret *Gertz* as eliminating the issue of public interest or concern from a discussion of the standard, the latest case from the United States Supreme Court, decided after *Ane*, interprets *Gertz* and makes clear that courts must consider

whether the alleged libel concerns a matter of public or private concern. *See Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, —— U.S. ——, 105 S.Ct. 2939, —— L.Ed.2d —— (1985).

In *Dun & Bradstreet*, the Supreme Court faced the issue of whether *Gertz* should apply when the plaintiff is private *and* the allegedly false and defamatory statements do *not* involve a public issue. The Court indicated that the pivotal question of whether speech addresses a matter of public concern must be determined by the expressions, content, form, and context as revealed by the entire record. *Id.* at ——, 105 S.Ct. at 2939. That determination must be made despite language in *Gertz* to the contrary. The Court concluded that an erroneous credit report did *not* involve a matter of public concern and accordingly permitted the recovery of presumed and punitive damages absent a showing of actual malice. *Id.* at ——, 105 S.Ct. at 2947-48. In light of *Dun & Bradstreet*, it appears the Supreme Court interprets the language in *Gertz* regarding determination of public versus private concerns as simply a rejection of *Rosenbloom*. Thus, notwithstanding the reluctance to permit courts to determine what is and what is not a matter of general or public interest, courts are required to do so.

In reviewing the Supreme Court cases from *New York Times* through *Dun & Bradstreet*, two considerations seem to be required in determining the standard of proof in defamation cases: (1) whether the alleged defamation arose out of a matter of public or private concern; and (2) whether the plaintiff is a public official, public figure, or limited public figure or private person.

We have no trouble determining that the instant case involves alleged defamation arising out of a matter of

public interest or concern. Nova University is an important part of its community and certain aspects of the disagreement between the Nova trustees and Della-Donna, such as local control and fiscal soundness, have an appreciable impact on the community. Thus, we believe the "speech" involved here addresses a matter of public concern in light of the "content, form, and context . . . as revealed by the whole record." *See Dun & Bradstreet,* —— U.S. at ——, 105 S.Ct. at 2947. Consequently, the next step is to determine the status of Della-Donna.

The parties agree that Della-Donna is *not* a public official or a general public figure. They disagree, however, on whether he is a "limited public figure" or simply a private plaintiff. Determining Della-Donna's status entails a two-step process. We must first identify a "public controversy" and secondly inquire into the nature and extent of the plaintiff's participation in that controversy. *Street* v. *National Broadcasting Co.,* 645 F.2d 1227, 1234 (6th Cir. 1981), *dismissed pursuant to stipulation,* 454 U.S. 1095, 102 S.Ct. 667, 70 L.Ed.2d 636 (1981). *See Hutchinson* v. *Proxmire,* 443 U.S. 111, 135, 99 S.Ct. 2675, 2688, 61 L.Ed. 2d 411 (1979); *Wolston* v. *Readers Digest Ass'n,* 443 U.S. 157, 164-69, 99 S.Ct. 2701, 2706-08, 61 L.Ed.2d 450 (1979); *Time, Inc.* v. *Firestone,* 424 U.S. 448, 453, 96 S.Ct. 958, 964, 47 L.Ed.2d 154 (1976); *Gertz,* 418 U.S. at 345, 94 S.Ct. at 2997.

In the context of determining the status of a plaintiff, a public controversy has been defined as "any topic upon which sizeable segments of society have different, strongly held views." *Lerman* v. *Flynt Distributing Co.,* 745 F.2d 123, 138 (2d Cir. 1984), *cert. denied,* —— U.S. ——, 105 S.Ct. 2114, —— L.Ed.2d —— (1985). Attracting the pub-

lic's interest is not enough. Thus, an essentially private dispute such as a divorce, regardless of the public's interest, is not a public controversy. *Firestone,* 424 U.S. at 453-54, 96 S.Ct. at 958.

Similarly, in *Hutchinson* the Court determined that the "broad question of concern about [federal] expenditures" as it related to the plaintiff's receipt of a federal grant was not a "public controversy." 443 U.S. at 135, 99 S.Ct. at 2688. Hutchinson was a government funded research scientist whose research efforts were publicly criticized by Senator Proxmire who designated Hutchinson as a recipient of his well-known "Golden Fleece" awards. *See also Wolston,* 443 U.S. at 166 n.8, 99 S.Ct. at 2707 (where the Supreme Court observed that it was difficult to determine with precision the "public controversy" into which the plaintiff allegedly thrust himself, but determined that Wolston was a private plaintiff because his actions did not constitute a voluntary thrusting or injecting into the alleged controversy).

In this case, although it is clear that the community had an interest in the outcome of the dispute, it is difficult to identify the public controversy with precision. Is it the issue of local control of Nova University or the fact that the university may suffer significant economic hardship if the Goodwin gift is not forthcoming? What exactly is the role of the public in this controversy? Is it anything more than taking sides in a disagreement between private litigants? Is the public interest in a community's university which is served by persuading a private donor to make a gift to a private university sufficient to constitute a public controversy? Could public opinion sway the outcome?

We have no trouble determining that this dispute was a matter of public interest. Designating it a public contro-

versy for purposes of the limited public figure analysis is, perhaps, more troublesome. Certain aspects of the disagreement between the Nova trustees and Della-Donna such as local control and fiscal soundness obviously impact on the public. The public in some measure was expressing its opinion through letters to the editor and editorials. These elements, among others, cast doubt on the view that this is strictly a private matter.

In *Waldbaum* v. *Fairchild Publications*, 627 F.2d 1287, 1297 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 898, 101 S.Ct. 266, 66 L.Ed.2d 128 (1980), the court articulated a test for the determination of a public controversy. The court stated:

> A general concern or interest will not suffice. . . . [The court] should ask whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy [footnotes omitted].

Applying this test to the instant case, the dispute involved in the instant case constituted a public controversy.

In addition to defining public controversy, the *Waldbaum* court also set out a three-part test for determining whether a person has become a limited purpose public figure. "Under this test the court must determine that there is a public controversy; ascertain that the plaintiff played a sufficiently central role in that controversy; and find that the alleged defamation was germane to the plaintiff's involvement in the controversy." *Dameron* v. *Wash-*

ington Magazine, Inc., 779 F.2d 736, 741 (D.C. Cir. 1985) (citing *Waldbaum*).

We have determined the existence of a public controversy. The question is whether Della-Donna played a central role in the controversy. The facts of this case require an affirmative answer to that question. It is true that Della-Donna was the trustee and the lawyer of the Trust in question. He had a duty to discharge his obligations as he saw them in order to effectuate his client's wishes. As a trustee, he participated in the designation of Nova as a beneficiary of the trust. As a trustee and lawyer for the trust he negotiated and litigated with Nova when he determined that the designation was an error and would not be in accord with the wishes of his deceased client and the settlor of the trust. Della-Donna argues that neither his actions as trustee and lawyer nor his position as a party in the litigation can make him a limited public figure. By placing primary emphasis on the plaintiff's motivation, Della-Donna forgets that "it may be possible for someone to become a public figure through no *purposeful* action of his own. . . ." *Gertz*, 418 U.S. at 345 (emphasis supplied). *Dameron*, 779 F.2d at 742.

This is not, however, one of those rare cases where the plaintiff became a limited public figure involuntarily. On the contrary, Della-Donna initiated a series of purposeful, considered actions, igniting a public controversy in which he continued to play a prominent role. Thus, Della-Donna fully met *Waldbaum*'s second criterion: "The plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution." 627 F.2d at 1297. That Della-Donna was

motivated by fiduciary obligations or ethical responsibilities is irrelevent.

Having determined Della-Donna to be a limited public figure, we have examined the record and concur with the trial court that no genuine issue of material fact exists from which a reasonable jury could find actual malice.

The summary final judgment is affirmed.

DOWNEY, *J.*, and HURLEY, DANIEL T.K., *Associate Judge*, concur.

APPENDIX B

Order Granting Summary Judgment and Final Summary Judgment

IN THE

CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

Case No. 80-5162 CD — "J" Lee

ALPHONSE DELLA-DONNA,

Plaintiff,

v.

GORE NEWSPAPERS COMPANY, etc., *et al.,*

Defendants.

THIS CAUSE came on for consideration before the Court upon the Motion of Defendant GORE NEWSPAPERS COMPANY (GORE) for Summary Judgment. Discovery has been conducted by all parties. The Court having considered the pleadings, affidavits, depositions and exhibits attached thereto, having had the benefit of written memoranda filed by both parties and having heard oral arguments and being fully informed in the premises hereby finds the following:

Plaintiff, ALPHONSE DELLA-DONNA, charged that the Defendant, GORE, libeled him in a series of articles which ran in the Fort Lauderdale News from May 6, 1978 to February 13, 1979. The articles concerned an ongoing controversy over the final disbursement of a 14.5 Million Dollar gift to Nova University; a private university located

in Broward County, and the composition of the Nova Board of Trustees. The Plaintiff, an attorney, was one of three trustees of the 'Unitrust' established by Leo Goodwin, Sr., founder of GEICO Insurance Company, and personal representative of the Leo Goodwin, Sr., Estate.

Some of the salient facts regarding the gift dispute are as follows:

On April 19, 1978, Plaintiff sent a letter to Abraham Fischler, President of Nova, charging "a fraudulent misrepresentation" and threatening to set aside the selection of Nova as donee of the Unitrust unless changes in the composition of the Nova Board of Trustees were made to ensure local control.

On April 25, 1978, Dr. David Salten, a Nova and NYIT Trustee, delivered a statement to the Nova Trustees critical of Nova and of Plaintiff's demands.

A petition was filed in Broward County Circuit Court by Nova on April 25, 1978, requesting that the funds be disbursed, and a press release regarding the filing of the petition was simultaneously issued by Nova.

In the ensuing days, several articles appeared in which Plaintiff's positions were reported and his statements quoted.

On May 3, 1978, the Fort Lauderdale News took an editorial position on the gift dispute which supported the Plaintiff's views.

On the same day, Plaintiff made available to the Defendant, GORE, a four-page document and a memorandum dated March 27, 1978, containing two options he had presented to Nova. These facts were reported by GORE.

On May 4, 1978, Plaintiff caused to be filed on behalf of the Estate of Leo Goodwin, Sr. a Complaint for Declara-

tory Judgment seeking Court approval of the recision of Nova as a donee of the Unitrust. The Complaint charges in part that Nova had made a fraudulent misrepresentation of material fact concerning the management and control of Nova. The filing of that Complaint and the charges contained therein were reported by GORE on May 5, 1978.

Based upon the entire record before the Court, the Court finds as a matter of law that the Plaintiff, ALPHONSE DELLA-DONNA, was a limited public figure in a matter of public controversy within the context of this lawsuit. *Arnold* v. *Taco Properties, Inc.*, 427 So.2d 216 (Fla. 1st DCA 1983).

Additionally, it is clear that the Plaintiff, ALPHONSE DELLA-DONNA, if he did not actually initiate the controversy out of which all of this arose, at the very least, voluntarily injected himself into the vortex of the public controversy concerning the gift to Nova. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967); *Gertz* v. *Robert Welch*, 418 U.S. 322 (1974). In *Curtis*, the Supreme Court ruled that those who "voluntarily inject their personality into the 'vortex' of an important public controversy are to be deemed limited public figures."

As a limited or 'vortex' public figure, Plaintiff is required to show that the allegedly defamatory statements were published with "actual malice." "Actual malice" is defined as publication "with the knowledge that it was false or with reckless disregard of whether it was false or not," *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). The extensive discovery conducted by the parties as evidenced by the record before the Court has failed to demonstrate by clear and convincing evidence that Defendant published the articles knowing they were deliberately false or published recklessly with serious doubts as to the truth

of the statements made. *St. Amant* v. *Thompson*, 390 U.S. 727 (1968). In fact, it is clear that there is absolutely no showing of actual malice that would give rise to a cause of action on behalf of a limited public figure.

There being no genuine issue as to any material fact before the Court, the moving party is; therefore, entitled to judgment as a matter of law. Fla.R.Civ.P. 1.510(c).

ORDERED AND ADJUDGED that the Defendant's Motion for Summary Judgment be and the same is hereby granted as to all Counts of Plaintiff's Complaint, and that Final Summary Judgment is hereby granted for the Defendant, GORE, and against the Plaintiff, ALPHONSE DELLA-DONNA, and Defendant GORE shall go hence without day. The Court retains jurisdiction of this cause for the assessment of taxable costs upon proper motion and notice by the Defendant, GORE.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida the 7th day of September, 1983.

A TRUE COPY

J. CAIL LEE

.....

J. CAIL LEE
Circuit Judge

Copies furnished to:

Ray Ferrero, Jr., Esq.
Jonathan W. Lubell, Esq.
Robert J. O'Toole, Esq.
Scott A. DiSalvo, Esq.
Karen Coolman Amlong, Esq.

APPENDIX C

Decision of Supreme Court of Florida

SUPREME COURT OF FLORIDA

TUESDAY, SEPTEMBER 9, 1986

Case No. 69,026

District Court of Appeal, Fourth District
No. 83-2146, 83-2437

ALPHONSE DELLA-DONNA,

Petitioner,

v.

GORE NEWSPAPERS COMPANY, a Delaware corporation authorized to do business in the State of Florida, and HAMILTON C. FORMAN,

Respondents.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

McDONALD, *C.J.*, BOYD, OVERTON and EHRLICH, *J.J.*, concur
ADKINS, *J.*, dissents

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Betsy Hell
/s/ BETSY HELL
Deputy Clerk

[SEAL]

cc: Hon. Clyde L. Heath, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. J. Cail Lee, Judge

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(2)

No. 86-929

In the Supreme Court of the United States

OCTOBER TERM, 1986

ALPHONSE DELLA-DONNA,
Petitioner,

---against---

GORE NEWSPAPERS COMPANY AND
HAMILTON C. FORMAN,
Defendants,

GORE NEWSPAPERS COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS OF THE STATE OF FLORIDA, FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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January 9, 1987

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16 pp

QUESTION PRESENTED FOR REVIEW

The four questions presented by Petitioner for review by this Court can be restated as one question:

> Did the Florida courts apply the correct criteria in determining that petitioner was a limited public figure within the scope of an identifiable public controversy?

RULE 28.1 LIST

Gore Newspapers is a subsidiary of the Tribune Co.*

List of Tribune Company's Subsidiaries

Chicago National League Ball Club, Inc.

Cubs Care

Tribune Company Overseas Finance N.V.

Tribune National Marketing Company

News Building, Inc.

NEWSPAPERS COMPANIES

Chicago Tribune Company

Chicago Relay Service Association
Chicago Tribune Charities, Inc.
Chicago Tribune Foundation
Chicago Tribune Newspapers, Inc.
Chicago Tribune Press Service, Inc.
Newspaper Readers Agency, Inc.
Penny Saver Publications, Inc.

Tribune Media Services, Inc.

New York News Inc.

Daily News Charities, Inc.
Daily News Foundation, Inc.

News and Sun-Sentinel Company

Gold Coast Publications, Inc.

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*(The corporate name for Gore Newspapers was changed to News and Sun-Sentinel Company after the initiation of this lawsuit).

Sentinel Communications Company

Sentinel Communications Charities, Inc.
Sentinel Printing Company

Tribune Newspapers West, Inc.

Daily News Foundation

Sunbelt Publishing Company

Tulsa Trading News, Inc.

Greensheet Publications, Inc.

News Press Company

The Daily Press, Incorporated

Hampton Roads Newspapers, Inc.

RADIO & TV COMPANIES

Tribune Broadcasting Company

Tribune Entertainment Company
WGN Continental Broadcasting Company

WGN of California, Inc.
WGN of Colorado, Inc.

WGNO Inc.
WPIX, Inc.

Connecticut Broadcasting Company

WGNX Inc.
KTLA, Inc.

GWB Productions

CABLE TV COMPANIES

Tribune Cable Communications, Inc. and Subsidiaries

Hampton Roads Cablevision Company*

Danville Cablevision Company*

NEWSPRINT/FOREST PRODUCTS COMPANIES

The Ontario Paper Company Limited

- Marlhill Mines Limited
- Ontario Paper Company Foundation
- Q.N.S. Paper Company Limited
  - Baie Comeau Company
  - Manicouagan Power Company
- Ontario Paper Sales Europe Limited

CORPORATE JOINT VENTURES

United Tribune Paging Corporation

Comeau Company Limited

Ontario Paper Recycling Inc.

JOINT VENTURES – PARTNERSHIPS

Knight News Wire

Tower Productions

220 East Limited Partnership

Scierie des Outardes Eng.

Tribune/Central City Productions

TV Network

AP News Plus & AP News Cable

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*Owned by The Daily Press, Incorporated

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STATEMENT OF THE CASE

The petitioner has proffered a Statement of the Case which is replete with factual misstatements, distortions and inaccuracies. We, therefore, restate:

Nova University in Fort Lauderdale, Florida, was, at the time of the alleged defamations, the only university in the community. Nova was given a multi-million dollar donation so it could continue to exist. Without warning, the gift and the University's existence were threatened by the actions of one man—the petitioner.

From the moment of the gift's designation to the time of delivery, the petitioner acted as a spokesman and, in his individual capacity, undertook certain voluntary and purposeful public actions which established himself as the lead player in the ensuing public controversy over his decision to rescind the gift to the University.[1]

In May, 1976, the petitioner publicly announced the gift to Nova University.[2] He informed the University that there were to be no restrictions placed on its use.[3] In

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1. The district court summarized the petitioner's role as follows:

> "This is not, however, one of those rare cases where the Plaintiff became a limited public figure involuntarily. On the contrary, Della-Donna initiated a series of purposeful, considered actions, igniting a public controversy in which he continued to play a prominent role." (Appendix to Petition at 11a).

2. The announcement by Mr. Della-Donna of the Goodwin gift was covered by Gore in a series of articles which ran on May 20, 21, 28 and June 24, 1976.

3. The pertinent text of the letter to Nova University states: "This gift is in the memory of Leo Goodwin, Sr., for the use of University exclusively to further its educational functions, to be expended or added to endowment as determined by the University Board. *Except for the requirement that the property be used for University's educational program, there are no restrictions whatsoever with respect to the use of these funds.*" [emphasis supplied]

early 1978, the petitioner unilaterally decided to rescind the donation.

The petitioner asks this Court to believe that the gift was restricted by the Grantor to local institutions which were locally controlled. (Petition at pages 4 & 5). He then asserts that upon discovering that the University was not locally controlled, his fiduciary duties required the rescission of the gift. (Petition at pages 4 & 5). The true facts, reflected by the trust document itself are that local control had nothing to do with the Grantor's intent,[4] but was the justification the petitioner chose for *his* decision to rescind the gift.

The petitioner, in his Statement of the Case, merely becomes "one of three trustees for the Foundation"; however, the record shows numerous statements and actions by the petitioner which demonstrate that he alone selected who the trust funds would go to, that he made the decision to rescind, and that *he intended to use the press as a forum for his views.* As petitioner testified at his deposition:

> "Yes. We met at the University, and I told them that I'm very disturbed about this, *because when I selected this University* . . .
>
> I said one is I close my eyes to the whole situation and give them the money. That I could not live with that, even if *I force them to put in the paper* that Nova is controlled by New York." [emphasis supplied]
>
> . . .

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4. The Leo Goodwin, Sr., Unitrust states at 3(b), "I desire, but do not require, that this charitable organization be either a school of higher learning in business or medicine, or a hospital." There is no mention at all in the trust document of an intent to benefit a *locally controlled* institution.

The American Bar Association also viewed the petitioner as the key figure in the gift controversy in its reinspection report concerning the Nova Law Center:

> "*Mr. Della-Donna* was sympathetic to the needs of the law school *and indicated he would approve the distribution of Unitrust assets for the law building* . . .[5] [emphasis supplied]

The petitioner was not just one of the Foundation Trustees who helped select the University and who joined in a consensus decision to rescind the gift. By his own words, he selected the University and he alone decided when and how the University would get the funds.

The Allegedly Libelous Articles in Context

Respondent published 78 articles between May 20, 1976, and October 17, 1979,[6] which covered the announcement of the Goodwin gift, the subsequent controversy over rescission and the controversy's eventual settlement.[7]

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5. The petitioner met with the American Bar Association without any representatives from the University or other Foundation Trustees present.

6. Many were in-depth investigative pieces; some were entirely based on interviews with Mr. Della-Donna. Some reported allegations made by both sides in court documents. (On April 25, 1978, the date Della-Donna threatened to begin proceedings to rescind the gift, the Nova Board of Trustees petitioned the Broward County Circuit Court for release of the Goodwin funds. On May 4, 1978, Della-Donna filed a Complaint for Declaratory Relief on behalf of the Estate of Leo Goodwin, charging Nova University with intentionally and systematically covering up an affiliation with the New York Institute of Technology and with "fraudulent misrepresentation.") Gore published an editorial on May 3, 1978, which clearly supported Mr. Della-Donna, entitled "Local Control of Nova University Must Be Restored."

7. The litigation ended when Della-Donna agreed to settle for one million dollars of Nova's proceeds from the gift for his fees and expenses. There was no change in the composition of Nova's Board of Trustees.

The petitioner claims he was libeled in six of these articles and in one letter to the Editor. However, it was not until May 6, 1978, that the first of the allegedly libelous articles appeared.[8] By then, the public controversy was raging: charges of fraud had been leveled against the University and its trustees by the petitioner, trustees had threatened to resign, and prominent Broward County citizens other than the petitioner and the University Board had become involved. One Trustee countered with widely disseminated charges of his own with respect to Della-Donna's role in the controversy,[9] which Della-Donna refuted in an

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8. Della-Donna states incorrectly in his Petition (at page 5), that from May 6, 1978, "he essentially stopped answering questions from the press . . ." The primary reporter testified that Della-Donna was readily available for telephone conferences until "after the matter ended in court. . ." This event occurred in late July, 1978, when the Broward Circuit Court, ruled in Nova's favor and ordered that $6.5 Million be turned over within 90 days.

Further, Della-Donna spoke with the same reporter at length about his proposal to the Fort Lauderdale Downtown Development Authority that Nova Law Center be located downtown, in late July, 1978.

Della-Donna also states incorrectly that he never "circulated any materials to the media." (Petition at page 8). The circuit court noted in its order, however, that on May 3, 1978, Della-Donna "made available to the defendant, Gore, a four-page document and a memorandum dated March 27, 1978, containing two options he had presented to Nova." (Appendix to Petition at 14a).

9. "I am even more distressed by the content and tone of Mr. Della-Donna's 'confidential' letter to President Fischler which has since been distributed to all the Nova Trustees. Any letter distributed so widely can hardly be considered to be confidential. I take, as a public affront, the implication that the trustees and Chancellor of Nova have concealed from Mr. Della-Donna the 'affiliation' and/or 'federation' with the New York Institute of Technology. The charge that we have been guilty of fraudulent misrepresentation is one which is going to be met publicly since I am of the opinion that the charge against us has already become a matter of public discussion."

(Continued on following page)

article published on May 6, 1978.[10] All used the newspaper as a forum for their views.[11] In short, the future of the only university[12] in Broward County, its faculty and its students had been placed in jeopardy by the Petitioner's independent actions taken subsequent to the unrestricted gift designation to Nova.

The Nexus Between the Alleged Defamations and the Controversy

The alleged defamations all concern the petitioner's myriad positions relating to the Goodwin interests,[13] and the impact those positions had upon the distribution of the trust funds. *None* of the alleged defamations had any-

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Footnote continued—

"My response to Mr. Della-Donna's malicious charges is *cui bono*. Whose interests have been served and will continue to be served by continued litigation? No trustee of Nova University has benefited personally from Nova University. The flow of funds, it must be remembered, has been from NYIT to Nova, not the other way around. On the other hand, I have been advised that the billings of Mr. Della-Donna and his associates as of this date are in excess of $900,000."

10. "In response to Salten's contention that he and his associates have submitted more than $900,000 in billings, Della-Donna said his law firm has never billed the university and has received just a fraction of that amount from the Unitrust."

"If they're accusing us of receiving that ($900,000) from Unitrust, well, that's absolutely false, the attorney said."

11. As another example, in an article published May 1, 1978, a former mayor of Fort Lauderdale and Nova Trustee raised the specter of Nova's collapse as a result of the attempted gift rescission.

12. In 1976, Nova University was the only undergraduate and graduate degree-granting institution in Broward County.

13. Mr. Della-Donna was Leo Goodwin, Sr.'s, accountant and attorney. He prepared Goodwin's estate, drafted the Unitrust document and litigated its validity. He served as Goodwin's Personal Representative and as a Trustee for the Goodwin Foundation. His law firm presently represents the Goodwin estate, the Unitrust and the Goodwin Foundation.

thing to do with his life apart from his various positions with the Goodwin family, none ever mentioned his private affairs or anything even remotely connected to it. Rather, the newspaper only reported charges made by others, which were in essence responses to allegations (of fraud and misrepresentation on the part of Nova) made by Della-Donna that had been published by the newspaper.[14]

REASONS FOR DENYING THE WRIT

The Florida Courts correctly applied the principles of this Court as articulated in Gertz v. Welch and its progeny and have struck the proper constitutional balance in determining that Della-Donna was a limited public figure within the context of the specific facts presented.

The Petition presents no conflicts among the decided cases, and there is no other reason for this Court to concern itself with this case.

This case is a classic example of a state court[15] following Constitutional and Supreme Court guidelines which are, of necessity, "broad rules of general application." *Gertz v. Robert Welch*, 418 U.S. 323 (1974). One of those broad rules, as noted in *Gertz*, is especially pertinent here:

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14. The alleged defamations, as summarized by the District Court in its opinion:

> "The first six [articles] essentially involve reporting the charges made by Nova in court documents that Della-Donna had improperly charged the estate over One Million Dollars in fees." (Appendix A, Petition).

15. "Although replete with First Amendment implications, a defamation suit fundamentally is a state cause of action." *Marcone v. Penthouse*, 754 F.2d 1072 (3d Cir. 1985), cert. denied, 106 S.Ct. 182 (1985).

> "The first remedy of any victim of defamation is self-help, using available opportunities to contradict the lie or correct the error and thereby minimize its adverse impact on reputation."

The petitioner repeatedly used the newspaper as a forum for his views.[16] The majority of the 78 published articles either quote the petitioner or recount his position on the controversy.[17]

Further, as the petitioner acknowledged, himself, he has suffered no damage to his reputation as a result of the alleged defamations.[18]

The cases cited by petitioner, rather than demonstrating conflict, show that the lower courts are applying the broad rules enunciated in *Gertz,* as refined in subsequent cases, to particular factual situations. The decision below rests upon its own peculiar facts and was correctly decided by the Florida courts.

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16. Della-Donna had the type of access which this Court has defined as "one of the accouterments of having become a public figure" that is, "regular and continued access to the media." *Hutchinson v. Proxmire,* 443 U.S. 111, 136 (1979).

17. The extent of the press coverage, although not determinative, is a relevant factor in determining whether a public controversy is involved. *Waldbaum,* 627 F.2d at 1297. The controversy was also covered by the Fort Myers/Florida News Press, Palm Beach Times, Winter Haven/News Chief, Sarasota Journal, Ocala Star-Banner, Lakeland Ledger, Miami Herald, and New York Law Journal.

18. In deposition testimony, Mr. Della-Donna acknowledged that he has not lost a single client since the articles appeared nor has he identified any potential clients he may have lost. He also noted that he was elected Treasurer of the Coral Ridge Yacht Club during the period when the alleged defamations were published; a position of trust such as this would hardly be given to a man whose reputation had been adversely affected.

Plaintiff also acknowledges being elected to the Knights of Malta after the alleged defamations appeared. The society admits only those who have contributed to the furtherance of Catholic charitable endeavors, and each member must be of the highest ethical character.

The Florida appellate court adopted the oft cited and well respected criteria for determination of a public controversy and limited public figure status found in *Waldbaum v. Fairchild Publications,* 627 F.2d 1287 (D.C. Cir. 1980), cert. denied, 449 U.S. 898 (1980).[19]

In fact, *Waldbaum* itself relied upon this Court's specific directions in articulating its criteria for determining limited public figure status. See, *Hutchinson v. Proxmire,* 443 U.S. 111 (1979); *Wolston v. Reader's Digest Ass'n, Inc.,* 443 U.S. 157 (1979); and *Time, Inc. v. Firestone,* 424 U.S. 448 (1976).[20]

Most importantly, this Court, in *Anderson v. Liberty Lobby,* 106 S.Ct. 2505, 2509, fn.3 (1986), approved the use of the *Waldbaum* criteria for determination of limited public figure status.

This is not a case of a reluctant participant in an essentially private matter being dragged into the public limelight. The Petitioner courted the public limelight by making himself available to the press and presenting his views to the public at large through its medium. He intended to use the press as a forum for his views by his own admission.[21] It was only when the judicial system

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19. The district court first determined that . . . "appellant and Nova University became *embroiled* in a dispute regarding the control of the University." (Appendix to Petition at 2a) [emphasis supplied]. The district court, using the standards articulated in *Waldbaum,* then stated, "applying this test to the instant case, the dispute involved in the instant case constituted a public controversy." (Appendix to Petition at 10a).

20. This Court has recently denied certiorari in another case that relied upon the *Waldbaum* standards. *Dameron v. Washington Magazine,* 779 F.2d 736 (D.C. Cir. 1985), cert. denied, 106 S.Ct. 2247 (1986).

21. See page 2, supra, where he stated that one of his options was to force the University to put it in the newspaper that they were controlled by New York.

ordered that he relinquish the gift, that he offered "no comment."[22]

Mr. Della-Donna was not a trivial or tangential participant in the controversy. On the contrary, as held by the district court, he:

> "initiated a series of purposeful, considered actions, igniting a public controversy in which he continued to play a prominent role."[23]

CONCLUSION

Based upon the foregoing reasons, Respondent respectfully asks this Court to deny certiorari.

Respectfully submitted,

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January 9, 1987

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22. The primary reporter testified that even after Della-Donna became unavailable for comment, "In each and every story in which Mr. Della-Donna was involved, I would make at least two efforts to contact him."

The reporter further testified that throughout the entire period when the alleged defamations were published, Mr. Della-Donna never complained to him about any of the articles or pointed out that there were any inaccuracies.

23. Appendix to Petition at 11a.

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Defendants,

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

PETITIONER'S REPLY BRIEF

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January 13, 1987

TABLE OF AUTHORITIES

No. 86-929

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ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

PETITIONER'S REPLY BRIEF

In this libel action petitioner seeks a writ of certiorari on the seemingly ubiquitous public figure doctrine, contending that the decision below has expanded the scope of that doctrine far beyond the First Amendment focus of *New York Times* v. *Sullivan* and that the doctrine needs definitional clarification by this Court in light of the varied treatments of different elements of the doctrine by the lower courts. Rather than challenging either of these contentions,[1] respondent asserts that this is not the proper

[1] Respondent does contend that the "Petition presents no conflicts among the decided cases" (Respondent's Brief in Opposition

(footnote continued on following page)

case for the Court to review these issues.[2] Because much of respondent's brief addresses the merits of the decision below and not whether that decision raises issues which should be reviewed by this Court by writ of certiorari, we direct this reply to matters which may bear upon the appropriateness of granting the writ, without presenting a comprehensive argument on the merits of each matter.

1. While respondent fails to show any actual nexus between the alleged defamations and the trustees' rescission of the gift of Unitrust funds, it argues that the defamations concerned petitioner's "myriad positions relating to the Goodwin interests," which, in turn, impacted upon the distribution of the trust funds, which, in turn, had a connection with the controversy (RB5). But even this attenuated, multi-staged attempt to construct a connection is wrong on the facts. Two of the three defamations—payment of "unconscionable" legal fees and bilking the estate of $1.3 million (Petition for Writ ("PB") p. 6), do not involve any trust funds; they relate only to the funds in Goodwin's probate estate. The third defamation, relating to an alleged diversion by petitioner of $9 million from the Unitrust to the estate (PB6), had no possible connection with the rescission of the gift. When the gift was made by the Foundation trustees, they advised the Nova University Board of Trustees, by letter dated May 3, 1976,

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("RB") p. 6). Perhaps respondent overlooked pages 16 through 22 of the Petition which specifically cite and describe the conflicts in the decided cases on the three components of the public figure issue involved in the case at bar: the nature of a public controversy, the required purposeful activity and the required nexus between the defamation and the public controversy.

[2] Respondent does not dispute that the decision below in this case involves all three of the critical requirements for public figure status: public controversy, purposeful activity and nexus.

that quarterly payments for a period of five years beginning May of 1971 had been and were being made from the Unitrust to the Estate pursuant to the terms of the trust. Thus, when the gift was given, it was expressly noted that it did not include the quarterly payments to the estate—the very payments which constitute the $9 million alleged as a diversion more than two years later.[3]

2. Contrary to respondent's contentions, this is not a case where petitioner "courted the public limelight" or used the press to present his views to the public concerning the controversy (RB8). It is uncontroverted that petitioner never held a press conference, never issued a press release, made available to Gore on request one document he had presented to Nova regarding a proposal concerning the issue of local control (*see* App. B at 14a), never circulated that document generally to the media, and never made a statement to Gore's reporters except in response to their questions.

Respondent's efforts to factually support its contentions do not meet that task. First, it argues that petitioner testified that he intended "to use the press as a forum for his views" and quotes a statement from petitioner's deposition (RB2, 8 & n.21). But in the very testimony quoted, petitioner rejects the use of the press, stating that even if the paper published that Nova was controlled by New York, he could not live with the situation (RB2). Thus,

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[3] The decision of the Florida District Court of Appeal, which twice noted the difficulty of designating the "public controversy" in this case (App. A at 9a, 9a-10a), found the "public controversy" in the dispute over local control of Nova University or over its fiscal soundness (*see* App. A at 10a). Not even a tortured, multi-staged, factually impaired analysis could create the appearance of a connection between the defamations at issue and the dispute over local control.

rather than saying he planned to use the media, petitioner indicated why he never regarded the media as a proper forum for the dispute, testifying that putting the facts in the media was no solution. Second, respondent discusses "widely disseminated" charges made by one of the Nova trustees against petitioner. Obviously, the fact that someone has widely disseminated his own charges after receiving a confidential and expressly limited communication from petitioner does not mean petitioner is courting the public limelight. Nor does the fact that petitioner responded to the press' inquiry about those particular charges (RB5 n.10) change the situation.[4] Third, respondent, referring to the deposition testimony of the primary reporter, argues that petitioner was readily available for telephone conferences until "after the matter ended in court." Respondent places that event in late July 1978. In fact, the primary reporter's deposition testimony also states that petitioner was not available for comment or did not respond to messages after "the [settlement] agreement fell apart that had been suggested by Judge Richardson." This event occurred about the 20th of June, 1978. At another point in his deposition, the same reporter testified in regard to the June 3, 1978, (*see* PB6) article that he could not remember whether petitioner "was making himself available for questions concerning these matters" at the time of that article. In any event, that petitioner for one period of time or another made himself available to answer a reporter's questions does not

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[4] Respondent writes "All used the newspaper as a forum for their views" (RB5). In regard to petitioner the record simply shows that during the early period of the legal dispute concerning rescission of the gift, petitioner answered questions from the press and furnished a document to a Gore reporter. That is it, there is nothing else—no matter how hard respondent seeks to recast petitioner's actions.

mean he was using the press to present his viewpoint. Further, respondent asserts that "[t]he majority of the 78 published articles either quote the petitioner or recount his position on the controversy" (RB7). In fact, from the time the dispute over the rescission of the gift was first publicized to the last article some 18 months later, the articles contain only six different quotes from petitioner, two of which were simply denials of the charges by him. The fact that petitioner's statements in response to a reporter's questions are repeated in later articles or that statements in petitioner's legal papers filed in court are quoted or petitioner's position in Court papers on the legal disputes is recounted, does not constitute evidence that "petitioner repeatedly used the newspapers as a forum for his viws" (RB7). At most, this is an example of a media defendant charged with defamation seeking to claim that plaintiff is a public figure because of the defendant's own conduct in publicizing the plaintiff. *Cf. Hutchinson* v. *Proxmire,* 443 U.S. 111, 135 (1979).

3. Respondent is wrong when it portrays petitioner as having purposefully and voluntarily undertaken the type of actions which make him a public figure. The reasoning of the Florida Appellate Court on this issue demonstrates why the writ should issue here. The court below described the actions of petitioner: (1) he participated in designating Nova as a beneficiary of the trust, (2) he negotiated and litigated with Nova when he determined the designation was an error (App. A at 11a). Based on these activities the court found petitioner had "initiated a series of purposeful, considered actions, igniting a public controversy . . ." (*id*). To the court below, then, the activities of petitioner as trustee and lawyer, resulting in a highly publicized legal dispute "igniting a public controversy"

are sufficient to make petitioner a public figure.[5] The court below thus determined that purposeful activity for public figure purposes can consist simply of activities as an attorney or party in a lawsuit where that litigation, or matters raised in it, become a subject of (i.e. ignite) a public controversy. This approach goes far beyond the scope of *Sullivan* protection afforded the media when attorneys or parties are involved, which this Court sought to formulate in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976). The analysis below also conflicts with the decision in *Waldbaum* v. *Fairchild Publications Inc.*, 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980), the very case relied upon by the Florida appellate court, for in *Waldbaum* the Court specifically noted that "participation in publicized litigation [is not] a sufficient condition for becoming a public figure." 627 F.2d at 1296 n.23.

Nothing presented in respondent's brief[6] alters the critical fact that the decision below affords this Court

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[5] The court below did not point to any participation by petitioner in any public debates, discussions, forums, etc. Rather, the court apparently took the position that petitioner continued to play a prominent role through his continuing activities as trustee and attorney.

[6] Respondent's brief contains an assortment of miscellaneous statements also directed at convincing this Court that this case should not be reviewed. For example, respondent asserts that local control had nothing to do with the grantor's intent (RB2). In fact, the grantor had designated a locally controlled Foundation to determine the disposition of the bulk of his trust and petitioner testified in his deposition with personal knowledge of the grantor's intent to benefit locally controlled institutions.

Respondent portrays the petitioner as acting alone as trustee (RB2). The record is clear that the acts of the Foundation Trustees were done by all three trustees and at no time did petitioner act as a trustee or make a trust decision by himself.

Respondent claims that petitioner acknowledged he had suffered no damages (RB7 & n.18). Respondent entirely ignored peti-

(footnotes continued on following page)

an opportunity to bring the public figure doctrine in line with the First Amendment focus of *Sullivan* protecting robust public debate on public issues and to supply guidelines to the doctrine in its three essential parts—public controversy, purposeful activity by plaintiff, and nexus between the alleged defamations and the controversy.

CONCLUSION

For all the foregoing reasons and those stated in the Petition, a writ of certiorari should issue to review the judgment and opinion of the District Court of Appeal of the State of Florida, Fourth District.

Respectfully submitted,

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January 13, 1987

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tioner's sworn testimony in 1982 that in the four years since the defamations he had not had a single new client of any substance and that the gross income of his law practice had gone down.

Respondent also states that the reporter testified petitioner never complained about the defamations when they were published (RB9 n.22), disregarding the fact that as to two of the defamations petitioner had denied them before they were published and as to the third the reporter himself testified this may have been when petitioner was not making himself available to the press.